



Robin G. Laurie
(334) 269-3146

March 16, 2012

BY HAND DELIVERY

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
RSA Union Building
8th Floor
100 N. Union Street
Montgomery, Alabama 36104



**Re: BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast
d/b/a AT&T Alabama v. Life Connex Telecom, LLC, f/k/a Swiftel, LLC
Docket No. 31317**

**BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
AT&T Alabama v. Tennessee Telephone Service, LLC d/b/a Freedom
Communications, LLC, d/b/a Freedom Communications USA, LLC Docket
No. 31318**

**BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
AT&T Alabama v. Affordable Phone Services, Inc. d/b/a High Tech
Communications Docket No. 31319**

**BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
AT&T Alabama v. Image Access, Inc. d/b/a New Phone Docket No. 31320**

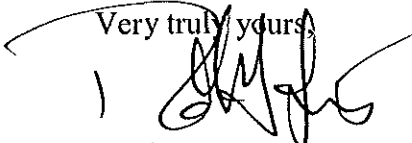
**BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
AT&T Alabama v. BLC Management, LLC d/b/a Angles Communications
Solutions Docket No. 31322**

**BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
AT&T Alabama v. dPi Teleconnect, LLC Docket No. 31323**

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Dear Mr. Thomas:

Enclosed please find the original and one copy of the Resellers' Response to AT&T's Notice of Subsequent Development filed on behalf of Image Access, Inc. d/b/a NewPhone, Docket # 31320, in the above-referenced matter. A copy of same was electronically filed earlier today.

Very truly yours,

Robin G. Laurie

RGL:dpe
Enclosures
Counsel of Record

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

In Re: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a
 AT&T Alabama v. LifeConnex f/k/a Swiftel, LLC
 Docket No. 31317

 BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a
 AT&T Alabama v. Tennessee Telephone Service, LLC d/b/a Freedom
 Communications USA, LLC
 Docket No. 31318

 BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a
 AT&T Alabama v. Affordable Phone Services, Inc. d/b/a High Tech
 Communications
 Docket No. 31319

 BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a
 AT&T Alabama v. Image Access, Inc. d/b/a NewPhone
 Docket No. 31320

 BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a
 AT&T Alabama v. BLC Management, LLC d/b/a Angles
 Communications Solutions
 Docket No. 31322

 BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a
 AT&T Alabama v. dPi Teleconnect, LLC
 Docket No. 31323

**RESELLERS' RESPONSE TO
AT&T'S NOTICE OF SUBSEQUENT DEVELOPMENT**

LifeConnex f/k/a Swiftel, LLC, Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC, Affordable Phone Services, Inc. d/b/a High Tech Communications, Image Access, Inc. d/b/a NewPhone, BLC Management, LLC d/b/a Angles Communications Solutions, and dPi Teleconnect, LLC (collectively, the "Resellers") respectfully submit this Response to BellSouth Telecommunication, LLC d/b/a AT&T Alabama's ("AT&T") notice of subsequent development filed with the Alabama Public Service Commission (the "Commission") on March 2, 2012, informing the Commission of the issuance of an Order by the Kentucky

Public Service Commission (the “KPSC”) on March 2, 2012, a copy of which is attached to AT&T’s notice (the “KPSC Order”).

RESPONSE OF RESELLERS

The KPSC Order denies dPi Teleconnect, LLC’s (“dPi”) Motion for Reconsideration of the KPSC’s January 19, 2012 Order in the same proceeding. In the instant KPSC Order, the KPSC relies on the recent Order by the United States District Court for the Eastern District of North Carolina (Western Division) in *dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina, et al.*, No. 5:10-CV-466-BO (the “NC Order”) in support of its denial of dPi’s Motion for Reconsideration.¹ AT&T recently filed a similar Notice of Subsequent Development in this docket on February 21, 2012 informing the Commission of the issuance of the NC Order, to which the Resellers responded by filing their Response to AT&T’s Notice of Subsequent Development on March 2, 2012 (the “Reseller Response”).

For the same reasons that the NC Order’s rationale and interpretation of *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 447 (4th Cir. 2007) is misguided, as more fully set forth in the Reseller Response, the KPSC Order is similarly misguided for relying on the NC Order in support of its denial of dPi’s Motion for Reconsideration.

As previously stated in the Reseller Response, despite the fact that the NC Order states that its ruling is guided by *Sanford*, the NC Order is instead contrary to the *Sanford* decision. The NC Order cites *Sanford* for the proposition that *Sanford* “requires that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers *by applying the wholesale discount*

¹ See KPSC Order, p.4.

to the lower actual retail price.”² This is what the Resellers are advocating in the instant proceeding, namely that the Commission’s wholesale discount percentage should be applied to reduce the “lower actual retail price” or “promotional rate” created by the cash back offering.

Again, as stated in the Reseller Response, the NC Order’s (and the instant KPSC Order’s) method of applying the percentage discount *twice*, to both the normal retail rate and the cash back promotion itself (the same approach advocated by AT&T), is clearly not what *Sanford* intends. The *Sanford* decision requires that the percentage discount be applied *once* to “the lower actual retail price”³ (the “promotional rate” referred to in the NC Order) created through the offering of a cash back promotion. The disconnect between the *Sanford* method and the method advocated by AT&T and in the NC Order and KPSC Order arises in cases like those at issue here where the cash back promotion amount exceeds the monthly retail price (*e.g.*, a \$25 service combined with a \$50 cash-back promotion). In these instances, AT&T’s methodology creates a *higher* price to resellers (through a smaller bill credit) than the price paid by AT&T’s retail customers, which is exactly the outcome that the Fourth Circuit found unreasonable in *Sanford*. Indeed, this approach violates federal law because it does not require AT&T to sell its services subject to promotions at a wholesale rate *below* the retail rate.⁴ This methodology also allows AT&T to use promotions to avoid its wholesale obligation in violation of paragraphs 948 and 950 of the FCC’s *Local Competition Order*.⁵ This flaw in AT&T’s method and in the NC Order’s interpretation of *Sanford* has been correctly recognized by the Public Service

² See NC Order, p. 5, citing *Sanford*, 494 F.3d at 443-44.

³ See NC Order, p. Order, p. 5, citing *Sanford*, 494 F.3d at 443-44.

⁴ See, *e.g.*, 47 C.F.R. § 51.607. “The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, *less avoided retail costs*, as described in section 51.609.” [Emphasis added.]

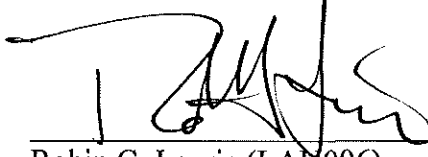
⁵ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 at ¶¶ 948, 950 (rel. Aug. 8, 1996) (“*Local Competition Order*”) (emphasis added).

Commission of South Carolina by directive issued on November 9, 2011.⁶

CONCLUSION

The Resellers hereby reiterate and reurge the points set forth in the Reseller Response regarding the flaws in the NC Order. For the same reasons, and for the reasons stated herein, the KPSC Order is similarly flawed in its reliance on the NC Order. The Resellers respectfully request that the Commission consider the foregoing when rendering a decision on the issues presented in this consolidated proceeding.

Respectfully submitted this 19th day of March, 2012.



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INC. D/B/A HIGH TECH COMMUNICATIONS

⁶See Public Service Commission of South Carolina Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, 2010-17-C, 2010-18-C and 2010-19-C, Commission Directive dated November 19, 2011, pp. 1-2.

Cash Back Offers. These are rebates to the purchasing consumer that require the purchaser to remain on the BellSouth network for thirty days before the rebate check is forwarded to the customer.

[S]ince the retail customer gets his rebate after keeping the service for thirty days, this Commission finds that thirty days should be the basis for calculating the rebate. *In the case where the rebate is greater than the first month's charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended. Therefore, in the special cases where the rebate exceeds the first month's cost of service, we find that the retail discount should not be applied to [the] rebate.* [emphasis added]

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TENNESSEE TELEPHONE SERVICE, INC. D/B/A
FREEDOM COMMUNICATIONS USA, LLC; BLC
MANAGEMENT, LLC D/B/A ANGLES
COMMUNICATIONS SOLUTIONS; AND dPi
TELECONNECT, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this ^{9th} ~~19th~~ day of ^{APRIL} ~~MARCH~~, 2012, a copy of the above and foregoing

has been served via U.S. Mail, postage prepaid, and addressed as follows:

Francis B. Semmes Esquire
General Counsel - Alabama
AT&T Alabama
Suite 28A2
600 North 19th Street
Birmingham AL 35203



OF COUNSEL